UNITED STATES DEPARTMENT OF COMMERCE National Oceanic and Atmospheric Administration National Ocean Service National Marine Sanctuaries Program Monterey Bay National Marine Sanctuary

# Monterey Bay National Marine Sanctuary Final Kelp Management Report

**Appendices** 

Release Date: October 3, 2000

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## Appendix 1

Response to Comments on Second Release of the MBNMS Kelp Management Report (October 3, 2000)

An attempt was made below to distill many of the major comments received under the June 2 to August 7, 2000 comment period for the "Draft MBNMS Kelp Management Report: Background, Environmental Setting and Draft Recommendations" (Second Release), and respond to them accordingly. Other, more minor, comments on the content of the Report, when the MBNMS agreed they were justified, were incorporated without notation directly into the text of this Final Release. If a comment was received that was previously addressed in the "Response to Comment" section of the Second Release of the Kelp Management Report, that comment was generally not re-addressed in this final release.

The Response to Comment Section below has been organized by comments received for each of the nine draft recommendations. A further section was added for pertinent public comments that related to other sections of the report.

**Draft Recommendation #1:** The MBNMS recommends that DFG's CEQA document fully analyze the State's costs in managing kelp harvesting, including monitoring and enforcement, and that these costs should reflect revenues generated from various fees collected from the kelp harvesting industry (e.g., license fees, business and personal taxes, tonnage fees).

**Comment:** Consideration of social and economic ramifications are not appropriate in the CEQA process.

**Response:** This issue was brought up and discussed at length by the MBNMS Sanctuary Advisory Council (SAC). After consultation with the SAC, the MBNMS agrees that such a consideration may not be appropriate in the CEQA process, though public understanding of this information is important for proper public discussion of kelp harvesting. Therefore, based on advice from the SAC, the MBNMS has changed the wording of this recommendation.

**Comment:** Fish and Game should have the flexibility to move funds between programs, and should not be limited to only using funds generated from a program, for that program. A concern exists that this could create a fractured management funding program if all resources were managed in this manner.

**Reponse:** The MBNMS believes that an industry that harvests a public natural resource should be responsible for ensuring that enough fees are generated from the activity to fund the proper management of the industry. The MBNMS concurs that, at times, it may be necessary to transfer funds within a management agency to pay for emergencies. The MBNMS also concurs that it is not intrinsically wrong for funds collected from one industry to be utilized for other necessary, though unrelated, activities that may not have a funding program associated with them. However, the MBNMS does not believe it would be good public policy to have a public natural resource extraction industry being subsidized by general taxpayer funds. Therefore, the main intent of this recommendation is to ensure that the funds collected from the kelp harvesting industry are sufficient to fund the management of that industry.

**Comment:** The recommendation should also read that fines collected from kelp regulatory violations should be used for kelp management and research.

**Response:** The MBNMS concurs with this comment and has edited the recommendation accordingly.

**Comment:** Management can be a black hole into which money is poured if proper planning does not occur first. There needs to be clear management regime decided upon before the funding levels are determined.

**Response:** The MBNMS concurs that the DFG and FGC should consider what is necessary for kelp resource management, within the practical limits of risk analysis, and then decide how much money is needed to support that management regime. In this report, the MBNMS has given these agencies its advice on this matter within Section 8.0, "Recommended Allocation of Agency Resources for Management."

**Comment:** Value of kelp should not be limited to the industrial value. Instead, value should be site specific and recognize the recreational and aesthetic values.

**Response:** The MBNMS concurs with this comment. The MBNMS has been actively working for several years to resolve issues of use conflict regarding kelp forests for the very reason that it believes kelp should not be considered only by its value on the world sodium alginate market. Many of the recommendations by the MBNMS reflect this belief.

**Comment:** The MBNMS should not be making recommendations for how the State spends its funds.

**Response:** Funding is central to the management of any natural resource. Ensuring an available source of ongoing funds for research, monitoring and enforcement is a first necessary step in setting up a management regime. Because the discussion is on the use of public (State) funds, the MBNMS believes it is very appropriate for it and the public to discuss how the funds should be used.

**Draft Recommendation #2:** The MBNMS recommends that California designate two no-kelp harvest areas along the Cannery Row area of the Monterey city coastline (DFG Bed #220). The first no-kelp harvest area should be from the Monterey Coast Guard Breakwater, and out 500 feet to the north. The second area should be to the 100 ft depth contour from the low tide mark between Prescott and Drake Avenues.

**Comment:** The two areas are too small to be worthwhile for any purpose. An area that is too small is worthless for conservation or as a recreational industry set-aside.

**Response:** The MBNMS has changed the recommendation to make the no-harvest area larger.

**Comment:** The entire area of Cannery Row should be set aside as a no-harvest area, though some compromise is possible.

**Response:** The MBNMS does not concur with the idea that the entire area of Cannery Row should be set aside as a no-harvest area. If there were presently no businesses that were involved and dependent on kelp harvesting along Cannery Row, or there were evidence that a natural resource threat existed, the MBNMS would concur with this comment. However, given the current situation as it now occurs, the MBNMS believes there are insufficient reasons to take such a drastic action. Through intensive work with parties involved, combined with advice from the MBNMS Advisory Council and its working groups and subcommittees, the MBNMS believes the best possible compromise on this action is to recommend that a portion of Cannery Row equal to about one-half its size be set aside as a no-harvest area. This recommended no-harvest area is heavily used by the recreation industries along Cannery Row.

**Comment:** None of the area along Cannery Row should be set aside as a no-harvest area, though some compromise is possible.

**Response:** The MBNMS does not concur with this comment. The MBNMS believes that for various reasons, including use conflicts, resource protection, and as a control site for scientific experiments, a no-harvest area along Cannery Row would be useful. For further discussion, see the Comment and Response above.

**Comment:** A no-harvest area that is too big forces kelp harvesters into smaller and smaller adjacent areas, thereby increasing the likelihood of an over-harvest in that area.

**Response:** The MBNMS concurs with this comment.

**Comment:** Another no-harvest area should be set up on a non-urbanized area where kelp harvesting also occurs, such as the area off Cambria. This would provide another a scientific control site for kelp studies.

**Reponse:** The MBNMS believes this comment has merit. While it is too late in the process to discuss this as a recommendation, it should be publicly discussed as a future management tool. As part of the proposed research topics or 2005 management regime review, perhaps this can be looked into.

**Comment:** A no-harvest area would have the additional benefit of providing an area where sea otters could retreat to (although they would continue to be prone to recreational disturbances). **Response:** The MBNMS concurs with this comment.

**Comment:** The Monterey Kelp Cooperative never intended to have its agreed upon two noharvest areas established to be permanently established by regulations.

**Response:** The MBNMS understands that the Monterey Kelp Cooperative never intended to have its two no-harvest areas permanently established in the regulations. The MBNMS believes that for such a no-harvest area to work, there must be a certain amount of public faith in the integrity of the areas. The MBNMS does not believe that the current socio-political situation would allow for a non-regulatory no-harvest area to garner such a public faith. Finally, the MBNMS commends the Monterey Kelp Cooperative for its work in moving the discussion along to the point where a no-harvest area was easily identifiable for the regulatory process.

**Draft Recommendation #3:** The MBNMS recommends that, without a special FGC approved permit, kelp harvesting north of, and including, DFG Kelp Bed #219 be exclusively by hand-harvesting (i.e., no mechanical harvesting).

**Comment:** Mechanical harvesters should not have areas in the northern portion of the MBNMS shut off to them. At various times in the past, it has become necessary for small mechanical harvesters from Morro Bay to move up to the Monterey Bay area when kelp supplies disappear in the south.

**Response:** The MBNMS received public comment in writing and at various public meetings stating that an advantage of mechanical harvesting is that it can generally range farther from launch ramps and harbor entrances than small hand-harvesting boats. By doing this, a mechanical harvester could facilitate the harvest of kelp away from areas near population centers, which may be already hand-harvested. Therefore, the MBNMS concurs that it may be disadvantageous to ban mechanical harvesters from kelp beds that are not presently hand-harvested. Should the area's kelp harvesters invest in a mechanical harvester, pressure could be removed from the presently hand-harvested kelp beds.

**Comment:** Do not close the area of Carmel Bay to mechanical harvesting. Due to the size of its kelp bed, its distance from shore, the infrequency of harvest, and the lack of information indicating any user or resource problems exist there, there is no need to close that bed to mechanical harvesting.

**Response:** Upon re-evaluation of the available information, as pointed out in public comment, the MBNMS concurs with this comment.

**Comment:** Questions were raised as to the validity of the conclusion that mechanical harvesting is more intrusive on a kelp bed, and its associated species (such as sea otters), than hand-harvesting.

**Response:** The MBNMS has come to believe, through public comment and observation, that mechanical harvesting, per ton of kelp removed, is generally no more or less environmental intrusive than hand harvesting. However, mechanical harvesting has the potential to remove large amounts of kelp from a small area in a very short period of time. In short, mechanical harvesting is much more efficient than hand harvesting. Therefore, mechanical harvesting is not compatible with certain recreational industries, and businesses that rely on the aesthetic qualities of kelp beds (restaurants, hotels, etc.). For this reason, the MBNMS believes the best solution to the problems of user conflicts, as seen in the area along Cannery Row, is to designate the areas of high recreational use (Beds # 220 and 221) as no mechanical harvest areas.

**Draft Recommendation #4:** The MBNMS recommends that the FGC allow the Monterey Kelp Cooperative to be the exclusive commercial harvester of DFG Kelp Bed #220, and that harvest from that bed be exclusively for the abalone mariculture businesses presently represented in the Cooperative. However, the MBNMS believes that persons or businesses in possession of herring roe permits should be exempted from this prohibition provided their harvests are done "by hand" for the herring-roe-on-kelp fishery.

**Comment:** There are problems with this recommendation, and any attempt to institute it as written, while possible, would be legally suspect. The greatest problem lies with the fact that the Cooperative is not a legal entity, but rather a gentlemen's agreement.

**Response:** In drafting this recommendation, the MBNMS was attempting to create a workable scheme of "limited entry" to the use of Bed #220 that would be fair to all existing kelp harvesters, while placing a cap on any future increase in the use of the area's kelp. Through the public comment process, especially comments received from members of the Monterey Kelp Cooperative, the MBNMS now believes that use of the Monterey Kelp Cooperative as a mechanism to enact the limited entry scheme will probably not work for a variety of reasons. However, the MBNMS still believes that some form of limited entry for the area of Bed #220, especially along Cannery Row, would be a powerful tool in limiting growth of kelp harvest in that area. The MBNMS has amended its recommendation accordingly

**Comment:** The recommendation as written, instead of being a "limited entry" scheme, appears to be a "sweetheart deal" between the regulators and the harvesters involved in the Cooperative. **Response:** Any limited entry scheme, by its very nature, allows some users to access a resource, while forbidding access to others. Most limited entry schemes created in fisheries involve the existing users of the resource, though other schemes exist. Examples of other such schemes are license "lotteries," and leasing of the resource rights to the highest bidders. In fact, this latter method of limited entry is already being used by the State in its management of kelp.

The modified limited entry scheme recommended by the MBNMS attempts to recognize the existing capital investments of businesses, and to preserve current livelihoods. For further discussion, see the Comment and Response above.

**Comment:** Alter this limited entry scheme slightly by just limiting the entry to all existing kelp harvesting permit holders. Any new permits that are issued would not be allowed to utilize Bed #220.

**Response:** The MBNMS believes this method of limited entry has substantial potential. However, the MBNMS has decided to use general wording of this recommendation, and allow the State to decide (should it concur with the MBNMS) how it will implement a limited entry scheme.

**Draft Recommendation #5:** The MBNMS recommends that no hand harvesting of *Nereocystis* be allowed in the MBNMS.

**Comment:** The ecological arguments put forward in the document cannot be backed by any credible studies.

**Response:** It is true that studies conducted to date, where *Nereocystis* has been harvested below the pneumatocyst, show no effect on future recruitment of *Nereocystis* in that area. However, all of these studies have been conducted in areas where *Nereocystis* is abundant, not in an area such as the MBNMS where *Nereocystis* growth is limited. Given the uncertainties on this matter, the longevity of individual *Nereocystis* plants, the location of *Nereocystis* reproductive tissues on the plant, and the relative unimportance of *Nereocystis* to harvesters, the MBNMS believes it is

prudent to forbid harvesting of *Nereocystis* until research can show that it is not ecologically significant.

**Comment:** Enforcement questions were raised, such as, "What happens if a harvester collects drift or beach-wrack *Nereocystis*. Would it be assumed that they have been cutting the kelp?" **Response:** These questions and concerns are valid, and must be considered. The MBNMS believes the best way to deal with such concerns is by limiting the timeframe in which *Nereocystis* would be illegal to possess. The MBNMS believes the best time to limit the harvest of *Nereocystis* would be before it has reached the height of its reproductive season (March 1 and July 31).

**Draft Recommendation #6:** The MBNMS recommends that DFG/FGC restrict harvest of any kelp bed to 50% of that bed's total maximum canopy cover per year, as determined from the overflight dataset collected by resource management agencies.

**Comment:** While a 50% cap might be worthwhile in Central California, it is not logical to impose that limit on Southern California kelp beds because of differing growth cycles. **Response:** After a re-review of the biology and natural history of kelp forests in Central and Southern California, the MBNMS concurs that these two regions have differing growth cycles for kelp. Southern California experience two separate growth peaks, and sometimes three (North, 1991). Therefore, while the MBNMS agrees that an annual cap of 50% may be inappropriate for Southern California, it continues to believe that a 50% cap is appropriate for Central California. The MBNMS Draft Recommendation has been altered accordingly in the final document.

**Comment:** Instead of a maximum kelp harvest limit, beds should be protected by establishing a minimum canopy level for beds (i.e., a seasonal sensitivity concept). When such a minimum level is reached (for example, a certain percentage of the maximum canopy cover), all harvesting in that bed should cease, no matter the cause of the decline.

**Response:** Abalone mariculturalists rely on a steady flow of kelp into their operations over the course of the year. These mariculturalists have an inventory of livestock that cannot be denied food for any long period of time. If the concept stated here were put in place, it could have the affect of completely shutting down all kelp harvesting in California for a certain period of time, up to one or two months. Such an action would have a devastating affect on these businesses.

**Comment:** It is uncertain how exactly this would be implemented. How would it be monitored?

**Response:** The MBNMS believes that resource management has greatly underutilized the potential of the information age. Ongoing input of harvest data into databases that are accessible via the Internet (along with an estimated conversion factor for canopy cover to weight) is one way that kelp harvests could be monitored on an ongoing basis.

**Comment:** The cost of such a management tool would be too expensive.

**Response:** The MBNMS does not concur with this comment. Initially, there would have to be several years of overflight data to determine the average sizes of the harvestable kelp beds. Once

this was accomplished, there would only be the need for an annual overflight at peak kelp production to ensure the beds had not undergone any shifts of increasing or decreasing kelp bed sizes.

**Draft Recommendation #7:** The MBNMS recommends that all parties interested in kelp use issues in DFG Kelp Bed #220 join in a discussion about the pros and cons of a kelp enhancement project.

**Comment:** The DFG does not have the resources to place such an effort high on its priority list. **Response:** The MBNMS recognizes that such a project may not be high on some agencies' or organizations' priority list, but did not want to ignore the desire of many individuals that harvest kelp and recreate in it.

**Comment:** Such ideas are driven by non-scientific opinions that place a higher value on one type of environment (e.g., rocky subtidal) over another environment (e.g., sandy subtidal). **Response:** This is absolutely true! The MBNMS was making no judgment calls on what type of habitat is better than another, or what type of habitat is "good" versus "bad." Instead, the MBNMS was proposing a discussion on this idea as means of facilitating educated discussions on this topic of great public interest.

**Comment:** The MBNMS should not get involved in such efforts to "alter" the natural ecosystem of the MBNMS. Besides, such efforts can easily turn into schemes for disposal of unwanted land "stuff."

**Response:** The MBNMS agrees with this comment in that caution must be exercised. The MBNMS does not believe the idea should be discounted "out-of-hand," without discussion.

**Comment:** If kelp began growing in such an enhanced area, and other living organisms followed, would the recreational community in several years suggest that no harvesting be allowed in that area due to its recreational importance?

**Response:** The MBNMS believes that if such a course of action (i.e., kelp enhancement project) were to take place, there would have to be a clear written understanding about the purpose and goals of the project.

**Draft Recommendation #8:** The MBNMS recommends that California keep all kelp harvest data per bed (leased or open) available to the public on an ongoing basis, and in a timely fashion.

**Comments and Response:** All commenters agreed that this is a desirable goal. Several ideas were generated as to how this could be done, such as publishing the data over the World Wide Web (WWW). All commenters, harvesters and non-harvesters alike, felt that DFG and the MBNMS had worked in good faith to help resolve the legal questions regarding the public availability of harvest information from leased beds, and were now happy with the result.

One commenter cautioned the use of such information could be taken out of perspective. The MBNMS agrees with this commenter, and believes care should be taken in how it is presented.

**Draft Recommendation #9:** The MBNMS recommends that kelp beds in the MBNMS and north of Año Nuevo Island (DFG Beds #224, 225, 226 and 301) be closed to commercial harvesting.

**Comment:** The problems with kelp growth in this area (e.g., water quality and lack of many sea otters) may be changed in the future, and the kelp forests may return. If this occurs, the MBNMS should not block future potential for kelp harvesting there.

**Response:** The MBNMS is only interested in closing these beds because the size of them is so small, any harvest at all might be ecologically significant, especially due to the fact that so much of the kelp there is *Nereocystis*. If, at some later date, because of water quality improvements or other changes in the environment, those beds became larger, the MBNMS may no longer consider harvest of these beds a problem. Monitoring of these closed beds would determine if they are robust enough for in the future. One way this could be done would be to establish a minimum canopy area that a kelp bed must cover. When the area of a small bed grows to reach that point, the bed could then be automatically reopened. Moreover, the DFG management regime is updated every five years, and can assess changes on that schedule.

## **Additional Comments Made by the Public**

These comments resulted from the public process and address concerns and issues not addressed by the Draft Recommendations above.

**Comment:** The MBNMS should have given the Monterey Kelp Cooperative more time to work out the multiple use conflicts before pushing for regulatory changes.

**Response:** The MBNMS would have liked to have given the Cooperative more time to resolve the issues in a non-regulatory way, and is supportive of what the Cooperative has accomplished to date. However, because we were working within the State's regulatory regime, combined with a belief that some issues may never be resolved by the Cooperative and the other user groups, the MBNMS embarked on this process. Another opportunity to work within the State's process would not come along again for five years.

**Comment:** The MBNMS should not compare only two kelp bed overflight studies (1999 and 1989), since there are not enough data points to indicate any trends.

**Response:** The MBNMS concurs with this comment. Very little can be concluded about trends from those overflight datasets, since they represent only two data points from a system that is known to be highly dynamic. The MBNMS has concluded only what it is reasonable to conclude from those overflights data sets, and nothing more. One conclusion the MBNMS reached, was that there probably was an issue concerning the size of the kelp beds in the northern part of the MBNMS. Both the 1989 and the 1999 overflights showed almost no kelp in that area, despite the fact that they were flown in early fall, the peak season for canopy cover.

**Comment:** The MBNMS kelp report should be based on the best available scientific data, not on political agendas.

**Response:** The MBNMS has based its kelp report on the best available information and data. Utilizing that information, it has made the best recommendations on the use of this natural resource.

**Comment:** The relatively intense participation of kelp harvesting interests in this process, as compared to recreational interests, should indicate the real concerns of the public.

**Reponse:** The relative interest and participation of various sectors of the MBNMS community in the preparation of the MBNMS Kelp Report process was noted by the MBNMS management.

**Comment:** Any limitations on where kelp can be cut will concentrate harvesting in other areas, thereby creating situations where overharvesting can occur.

**Response:** The MBNMS concurs with this comment, and has limited its recommendation of areas to be closed to harvesting for this reason, among others.

**Comment:** The MBNMS should not rely on the DFG to regulate kelp harvesting within the MBNMS, with the MBNMS only providing recommendations. The MBNMS should issue its own Federal regulations on the matter.

**Response:** In the National Marine Sanctuaries Act, the Federal government is directed to work cooperatively with existing agencies. The MBNMS believes that issuance of Federal regulations in this area should be considered a means of last resort.

**Comment:** The MBNMS and DFG should institute a Memorandum of Agreement (MOA) formalizing their relationship on how kelp will be managed in the MBNMS.

**Response:** This is a potentially good idea, and one that the MBNMS will consider in its continuing relationship with the State on kelp management.

**Comment:** Beds should be rotated between a harvest and a no-harvest status.

**Response:** This is an alternative approach to kelp management that the MBNMS believes has merit. While the MBNMS rejected (mostly due to the complexity of designing such a system) this idea early in its process of developing draft recommendations, the MBNMS still believes the idea should be considered for future refinements of kelp management within the MBNMS.

**Comment:** The present definition of "take" in the California Code of Regulations does not presently include plants. For enforcement purposes, it should be amended to include plants. This is a technical refinement of the regulations.

**Response:** The MBNMS concurs with this comment, and has added it to its list of recommendations to the State.

**Comment:** DFG needs to dedicate full-time, year-round staff to the issue of kelp management. Such staffing needs to cover the issues of proper enforcement, monitoring, and research. **Response:** The MBNMS concurs with this comment, and has added a section (Section 8.0) to this final Kelp Management Report recommending a management agency resources allocation

scheme for kelp management in the State of California.

**Comment:** DFG should re-number the bed designations to more accurately reflect meaningful ecological units, and/or more accurately reflect kelp harvesting intensities. For example, in DFG Bed #220, the area from Cypress Point has one type of environment and is barely harvested, while Point Pinos to the Coast Guard Breakwater has another type of environment and is more heavily harvested.

**Response:** While the MBNMS did not include this as one of its recommendations, it believes the idea has significant merit. The MBNMS would like to keep this idea as an alternative for DFG to consider in its review of its management regime.

**Comment:** Kelp harvesters should be required to attend a course in ways to approach sea otters and other wildlife.

**Response:** As can be seen from the redrafting of the recommendations from the second release of the report, the MBNMS has included a new recommendation to initiate a relevant program.

**Comment:** A number of recommendations have been made that should be added to the Research Agenda section of the kelp report.

**Response:** Where appropriate, these items were incorporated.

**Comment:** Any effect on kelp forests by kelp harvesting must be considered a threat to sea otters.

**Response:** The MBNMS agrees that more information on the effects on sea otters of kelp removal would be helpful. The MBNMS has included in its research recommendations specific studies into the effects of kelp harvesting on sea otters.

**Comment:** The MBNMS process on developing kelp management recommendations to the State of California continues to be poorly publicized. This is part and parcel of an effort by the MBNMS Staff to stifle public input.

**Response:** The MBNMS has made every effort, above and beyond the requirements of any public process law, to publicize this process and encourage public support.

**Comment:** The State's kelp is presently well managed. Why does the MBNMS believe that it needs more monitoring, enforcement and regulations?

**Response:** The fact that a lot of public controversy has surrounded this issue over the past several years shows the MBNMS that it is something the public cares about, and is concerned with. The MBNMS, as a trustee of the public resource, owes it to the public to get involved in the management process and work to make the management regime better. The MBNMS does not believe the DFG has been doing an inadequate job at this point, but believes (as the State becomes more crowded) the management regime needs constant refinement in order to keep it up-to-date with the present social, economic and environmental conditions.

**Comment:** The MBNMS needs to discuss whether or not the removal of kelp is affecting sea otter behavior, especially during times of low kelp abundance.

**Response:** All evidence and expert opinion to date, though limited, does not indicate that the amount of kelp harvested is significant enough to warrant a concern regarding the behavior of

sea otters, especially since sea otters are not obligate residents of kelp forests. The MBNMS does agree that this is an issue that deserves further investigation, and will pursue efforts to facilitate relevant studies within the resource constraints of the MBNMS. The MBNMS has added this as a topic in the Research Recommendation list of the MBNMS Kelp Report.

**Comment:** The MBNMS may be in violation of provisions of the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA).

Response: The MBNMS, by virtue of its statutory purpose, is committed to the goals of the MMPA and the ESA. However, this comment is based on an apparent misunderstanding of what the MBNMS Kelp Management Report is. The Report is not an action on the part of the MBNMS, nor is it a decision, nor is it a use of the regulatory authority or program. The MBNMS Kelp Management Report is a compilation of background information and recommendations to the State of California for the State's kelp management program. The MBNMS does not authorize, fund or carry out any of the State of California's programs for kelp harvesting or other kelp management activities. The MBNMS currently does not have any regulation or program for kelp management, and accordingly is not causing take that is prohibited by the ESA and the MMPA. The MBNMS notes that the State of California in its kelp management program must comply with all applicable laws involving protecting listed species and other protected marine mammals.

**Comment:** The MBNMS has failed to satisfy its obligations under the National Environmental Policy Act (NEPA).

**Response:** NEPA (an EIS) is triggered when a Federal agency takes a major Federal action significantly affecting the quality of the human environment. Because the MBNMS Kelp Management Report does nothing other than to provide background information and make recommendations to the State of California on the State's kelp management program, the MBNMS has not taken any Federal action.

**Comment:** Anecdotal information exists that harvesters are not abiding by existing kelp regulations.

**Response:** DFG should use anecdotal information to initiate investigations as to whether or not regulatory impropriety exists. If any member of the public has evidence to back up anecdotal information, he/she should deliver it to the proper regulatory enforcement representatives.

**Comment:** The MBNMS needs to concentrate its efforts on the invasive species, *Caulerpa taxifolia*.

**Response:** The MBNMS is monitoring the *Caulerpa taxifolia* issue in California, and around the world. However, at this point, this comment is beyond the scope of this process.

# Appendix 2

Response to Comments on First Release of the MBNMS Kelp Management Report (June 2, 2000)

An attempt was made below to distill many of the major comments received under the January 14 to February 23, 2000, comment period for the "Draft MBNMS Kelp Management Report: Background and Environmental Setting" (First Release), and respond to them accordingly. Other, more minor, comments on the content of the Report, when the MBNMS agreed they were justified, were incorporated without notation directly into the text of this Second Release.

The Response to Comment Section below has been organized into four categories: Research and Science Comments, Multiple Use Comments, Process Comments, and Management Recommendations.

### **Research and Science Comments**

**Comment:** No mention is made of nutrient regimes in the Environmental Setting section. High nutrients characteristic of upwelling are critical for kelp growth and persistence. Information on temporal and spatial variation in nutrients should be included here if the MBNMS cares to impart a better understanding of the environment that leads to kelp forests in the MBNMS.

**Response:** The MBNMS concurs with this comment, and has corrected the second release accordingly with information from the MBNMS Site Characterization.

**Comment:** The Geology subsection section of the Environmental Setting section should include information on nearshore substrate types, especially consolidated substrates such as granite and mudstone, their dissolution rates and resulting influences on turbidity, distribution of unconsolidated and consolidated substrates, etc. This information should be included if the MBNMS cares to impart a better understanding of the environment that leads to kelp forests in the MBNMS.

**Response:** The MBNMS concurs with this comment. Unfortunately, no information on this matter has been added to the MBNMS Site Characterization. The MBNMS will take this under consultation for future updates to the Site Characterization.

**Comment:** There needs to be a greater discussion of the seasonable nature of kelp growth and abundance, and effects from natural events (e.g., El Niños/La Niñas), in order to put the issue of kelp harvesting into perspective.

**Response:** The MBNMS agrees with this comment, and has tried to give a better explanation of this phenomenon in the second release of the MBNMS Kelp Report.

**Comment:** The data being used by the MBNMS, and supplied by the DFG, does not reflect the fact that kelp harvesting has been cut in half in California since 1993 when ISP Alginates shifted many of its lower grade production to a facility in Scotland. The data needs to be updated for this discussion; otherwise the public cannot reasonably conceptualize the issue.

**Response:** The MBNMS was made aware of this fact during the comment period for the first draft of the MBNMS Kelp Report. The MBNMS has worked with DFG to get these new data and update the areas in the Report where it was referred.

**Comment:** The MBNMS Kelp Report should address the issue of declining kelp beds in the San Mateo County area, and protect those beds that still exist.

**Response:** This annectodal information about possible recent declines in kelp forest abundance and distribution along the San Mateo coastline first came to the attention of the MBNMS during the first MBNMS Kelp Report comment period. While the MBNMS cannot verify the past declines with data, the MBNMS is convinced that the beds north of Año Nuevo are too small to support any sustained commercial harvests. Therefore, the MBNMS is recommending that these beds be closed to harvesting.

**Comment:** There are other species of special concern that are not mentioned in the Kelp Management Report that may be affected by kelp harvesting. For example, the Federally Threatened Marbled Murrelet (*Brachyramphus marmoratus*) feeds on small fish in and around kelp beds. Also, the Federally Threatened Western Snowy Plover (*Charadrius alexandrinus nivosus*), that feeds in and around kelp wrack.

**Response:** The MBNMS concurs with this comment that there may be more species of concern, other than just sea otters, when considering the importance of kelp forests. However, for bird species, as stated in several places in the report, little is known about their dependence on kelp forests. Nothing is known of the effect of kelp harvesting on these bird species. The MBNMS has taken this issue under consideration in its draft Recommended Research Agenda (below).

**Comment:** The MBNMS should conduct a full-scale study on ALL impacts to kelp forests, with all users included. This would allow everyone to study the relative impact of various activities on kelp forests.

**Response:** While the MBNMS agrees that this would be a worthy endeavor, such an undertaking would require a long period of time and a large amount of funds. The MBNMS will continue to work, within it budgetary constraints, to fill the voids in the understanding of all the social uses of MBNMS kelp resources.

**Comment:** The MBNMS does not mention the numerous anecdotal observations made by members of the public that indicate there is overharvesting being conducted in the Sanctuary. **Response:** Anecdotal information is useful in pointing resource managers in a particular direction that should be more carefully studied. However, due to anecdotal information's sometimes conflicting nature, and the difficulty in verifying it, such information cannot be used in a wholesale manner.

**Comment:** The MBNMS should use nothing but peer-reviewed literature in its Kelp Report. The Kelp Report relies too heavily on anecdotal observations.

**Response:** The MBNMS does not agree that only peer-reviewed literature should be used in the process to determine the best management of the MBNMS natural resources. Other scientific studies and reports are not limited by convention to only referring to peer-reviewed literature. There is often useful information contained in gray literature and in anecdotal observations.

Obviously, much greater care in determining the reliability of the source is needed when utilizing such information.

**Comment:** The importance of the kelp as habitat to sea otters must be thoroughly examined in order to make the best management decisions on kelp harvesting.

**Response:** The MBNMS will utilize the best available information in the process to determine what recommendations will be forwarded to the DFG and FGC. Such information will include the best information available on sea otters and their use of kelp forests.

**Comment:** Write the experimental no-take plot (Prescott to Drake Street) along Cannery Row into the regulations to ensure no future harvests occur in them and destroy valuable research. **Response:** The MBNMS concurs that a no-take area, in addition to the Hopkins Marine Station Reserve, would be useful as a control site for further research into the effects of kelp harvesting. The MBNMS is is recommending this to DFG/FGC as a management consideration.

**Comment:** The MBNMS Kelp Report fails to recognize and define the multiple definitions of "overharvest."

**Response:** The MBNMS concurs that there are many definitions of "overharvest" (from aesthetic use standpoints to ecological ones) and many parameters that could be established to determine whether or not the effect has indeed occurred. The MBNMS has revised this second release with this point in mind.

**Comment:** No kelp harvesting, in all or part of the MBNMS, should be allowed until all the research has been done to assure no environmental impact is taking place.

**Response:** The primary purpose of the MBNMS is resource protection. The MBNMS is also to, among other things, facilitate compatable multiple uses of the MBNMS. The MBNMS believes continued kelp harvesting, properly regulated to ensure overharvesting does not occur, is compatible with these mandates. While the MBNMS does concur with the comment that further research is needed, it has not been convinced that any significant environmental impacts are occurring in areas where limited harvesting occurs. As stated previously, the MBNMS will continue to encourage and facilitate research that enlightens our understanding of kelp forest ecology, and what effects human activities have on it. Such research will allow the MBNMS and DFG to more properly fine-tune regulations that ensure over-harvesting and other harmful activities do not occur.

**Comment:** The Donnellan and Foster (1999) study did not prove that no effect was occurring in the study area due to kelp harvesting. However, the MBNMS Kelp Report says it did. **Response:** The wording used by the MBNMS in this section may have been misleading to the public, and has been edited. It must be remembered that scientific studies search for an "effect" using statistics. The "null hypothesis" is generally a "no-effect conclusion" (i.e., no effect from kelp harvesting). Therefore, the Donnellan and Foster (1999) study merely concluded that not enough data existed to significantly dislodge the null hypothesis, though it "indicated" that no effect was being done by the harvesting (see Zar, 1999).

**Comment:** There should be more research into artificial feeds for abalone.

**Response:** The MBNMS agrees that development of artificial abalone feeds would help eliminate many of the observed problems. The MBNMS will continue to encourage research into artificial abalone feeds.

**Comment:** There should be more research into kelp harvesting techniques that are not environmentally harmful.

**Response:** The MBNMS agrees that research into optimal and least intrusive kelp harvesting techniques is a worthy endeavor. The MBNMS will continue to encourage research into alternative harvest techniques.

**Comment:** It is obvious that kelp harvesters have had a significant impact on the kelp beds along Cannery Row. In the summer of 1999 we had plenty of kelp along that area, now that we're in the winter of 2000 there's none there.

**Response:** The MBNMS does not agree that this comment is necessarily factual. During the winter of 1999/2000, there were a number of storms in the area. During this time, the MBNMS staff has been observing the area of Cannery Row, visually comparing areas that are harvested to areas that are not harvested (Hopkins Reserve and the Prescott to Drake Street Control Site). Visually, there is no difference between the various cut and uncut areas. This would lead the MBNMS to believe that the major reason for reduced kelp canopy cover this winter is due to natural causes, and not kelp harvesting.

Also, as discussed previously in this document, kelp forest canopy cover can have tremendous variability in size and density. This large variability is true not only between summer and winter, but also between subsequent summers or subsequent winters.

**Comment:** There are factual and interpretation errors in the Draft MBNMS Kelp Management Report that need to be corrected. The MBNMS should seek outside peer review of the Report. **Response:** The MBNMS agrees that the Report can be improved with an outside scientific review. Therefore, the MBNMS requested that its Research Activity Panel recruit a subcommittee of kelp forest and social science specialists to review the Report and make recommendations for its improvement. This second release of the MBNMS Kelp Report has been improved based on close review by that subcommittee.

Comment: The "Diver Disturbance in Kelp Forests" study by Mr. Tim Schaefer and Dr. Michael Foster was inaccurate due to biases by the researchers. Therefore, this study should not be referenced in the MBNMS Kelp Report. The study should have been peer-reviewed. Response: The MBNMS does not agree with this comment. Dr. Michael Foster has an internationally respected reputation as a foremost authority on the ecology of kelp forests. Mr. Schaefer and Dr. Foster's scientific methods and conclusions in the study were reviewed by a committee of the MBNMS Research Activity Panel, and found to be scientifically sound, with resource management value to them. Dr. Foster has informed the MBNMS that a version of this report has passed the peer review process for publication in a scientific journal, California Fish and Game.

**Comment:** With the extensive marine science "brain trust" available in the MBNMS area, especially around Monterey Bay, why has there been so little work done on this matter, and why can't the MBNMS not get someone to focus more research effort on this issue.

**Response:** The MBNMS would like to see the issue of kelp use in the MBNMS further studied, from an ecological standpoint, as well as from a social and economic standpoint. The MBNMS has made the decision to commit funds from its budget, and to work cooperatively with DFG, to study these issues, including social, ecological and economic issues, for several years into the future. The MBNMS is also actively trying to leverage funding from other sources (Sea Grant, etc.), as well as to motivate regional researchers to investigate these issues.

# **Multiple Use Comments**

**Comment**: The safety of boaters and the public who utilize the kelp beds has not been adequately addressed.

**Response:** While the MBNMS did discuss the issue of boating safety in the first MBNMS Kelp Report, it may not have emphasized its importance to all users (e.g., kelp harvesters, boaters, divers). Of course this issue is at the core of the DFG Kelp Bed #220 issue. The MBNMS has made an effort to correct this.

**Comment:** The terms "Consumptive Users" and "Non-Consumptive Users" are misleading in their connotation

**Response:** The MBNMS agrees with this comment, and has changed the terminology in the second release of the Kelp Management Report to more accurately portray the interests involved.

**Comment:** The "Consensus Recommendation Document" of the Business and Tourism Activity Panel's (BTAP) subcommittee represents a very small group. Some important stakeholders were not included, which makes its value extremely limited.

**Response:** The BTAP made a sincere effort to make an initial step towards a consensus for resolving some of the use conflicts that have been seen along Cannery Row with regard to kelp use. At the table for these discussions was a diving industry representative, a kayaking industry representative, two kelp harvesting representatives, and a marine scientist from the Monterey Bay Aquarium acting as facilitator. The MBNMS is not advocating that this consensus document be accepted as the end of further negotiation. However, the MBNMS is proud of the fact that the BTAP was able to make some headway on this contentious issue, and believes the BTAP committee recommendations are a good starting point for developing final solutions to these problems.

**Comment:** This Draft MBNMS Kelp Management Report discusses many other kelp use activities, such as kayaking and diving. However, it was only supposed to be about developing guidelines for kelp harvesting in the MBNMS.

**Response:** The MBNMS began preparing the Kelp Management Report about nine months ago to develop MBNMS views on kelp "use" in the Sanctuary. In fact, the MBNMS recognizes this to be a multi-faceted issue. The issues are complicated and include resource use conflicts, lack of comprehensive data, adequacy of current regulations, cumulative environmental impacts, existing capital business investments, current livelihoods, and more. Obviously, with the

window of opportunity for change now open to us with the re-writing of the DFG Kelp Management Plan, this was the perfect time for us to address all of these issues.

**Comment:** Kelp harvesting should only be allowed to occur in areas that have been environmentally enhanced to recruit kelp to those areas, and the MBNMS should be involved in encouraging this transition.

**Response:** The MBNMS agrees that alternative management techniques, such as kelp growth enhancement with, for example, artificial reefs, should be explored and studied. However, a goal of the MBNMS is to help preserve the natural environment of the MBNMS. Therefore, introduction of such enhancement projects as artificial reefs would have to be carefully weighed, and studied to ensure no unintended environmental effect took place. In this release of the Report, the MBNMS has examined alternate management strategies suggested to us, such as moving the kelp harvesters to areas that are enhanced with artificial reefs.

**Comment:** The Kelp Report lists under "Section 2.4 Public Involvement" a number of businesses and interests to be consulted. Why does it not list all of them? **Response:** It would have been unwieldy to list every type of business or public interest group that could possibly be affected by this process. This list was intended to be a sampling of groups the MBNMS would be involved with. Certainly other groups exist, such as: restaurateurs, hotel owners, community hospitality organizations, diving organizations, kayaking organizations, etc.. Every effort has been and will continue to be made to consult with all interested parties.

Comment: Tonnages of kelp harvested in this study are inaccurate due to the fact that kelp harvesters self-report their tonnage to DFG, and could under-report their hauls if they so desired. Response: Numerous fisheries exist in the United States in which data that is used for management purposes is self-reported by the fishermen. While the MBNMS agrees that there are inherent conflicts of interest in such a scheme, the increase in management personnel and costs required to certify all kelp harvest amounts, along with all the other self-reported fisheries in California, would be staggering. DFG currently has regulations in place that makes it a crime to intentionally under-report kelp tonnages. The MBNMS would support increased vigilance on the part of enforcement agencies to ensure accurate tonnages of kelp are reported. The MBNMS would be interested in hearing reasonable suggestions from the public in how this issue could be resolved to a broad satisfaction. Additionally, some kelp harvesters are in the business of selling the kelp they harvest. Therefore, under-reporting of kelp harvests by these individuals would be counterproductive to their livelihoods.

**Comment:** The "Ed Ricketts Park" is not mentioned in the Report as an area in which kelp harvesting and other activities are restricted.

**Response:** At the time of the writing of this document, the legality of establishing an Ed Ricketts Underwater Park along the Monterey and Pacific Grove coastlines was an issue being reviewed by the California judicial system, with two California jurisdictions taking opposing views on the issue. The MBNMS has no opinion on whether or not the municipal jurisdictions involved have the authority to establish the Ed Ricketts Park and its regulations. The MBNMS will respect and work with whatever State jurisdiction(s) the California courts eventually

recognize as having the authority to issue natural resource regulations in that area. This draft of the Report has been revised to include the most timely information on this topic.

**Comment:** The MBNMS Kelp Report is obviously biased against the recreational kelp use interests, such as divers and kayakers.

**Response:** The MBNMS disagrees with this statement, and believes it has made every effort to balance all issues in kelp use.

**Comment:** The MBNMS Kelp Report is obviously biased against the kelp harvesters, such as abalone mariculturalists.

**Response:** The MBNMS disagrees with this statement, and believes it has made every effort to balance all issues in kelp use.

### **Process Comments**

**Comment:** The name of the document, "MBNMS Kelp Management Plan" should be changed, since the MBNMS is not actually writing regulations.

**Response:** While it's true that the MBNMS is not presently pursuing Federal regulations in this particular process, the product will be a document that describes how the MBNMS would like to see kelp harvesting managed within the bounds of the MBNMS. However, if the document is called a "Plan", it could be confused with the document being produced by the State of California. Additionally, there may be expectancies from a document called a "Plan", such as future Sanctuary regulations. Therefore, the MBNMS has decided to changed the name of this document to: "MBNMS Kelp Management Report".

**Comment:** There should be a map and discussion in the MBNMS Kelp Report that designates all of the kelp "no-take" areas in the MBNMS.

**Response:** The MBNMS agrees with this comment, and edited the second release of the Report to show this information.

**Comment:** The MBNMS did not provide enough public notice about the Report's availability, the comment period, or the public meetings that were held on it. Therefore, it's obvious that the MBNMS is trying to railroad the process by limiting public involvement.

**Response:** The MBNMS does not agree with this comment. The entire process embarked upon for this Report was engineered to maximize public input. The MBNMS made numerous efforts, many of them beyond the normal public process for releasing public information. Within the first comment period, the MBNMS released no fewer than four Press Releases announcing the release of the draft Report. Numerous press, radio and television outlets, from *The San Francisco Chronicle* to *The Cambrian* picked up on the issue and ran stories. The MBNMS also made numerous announcements about it on the MBNMS Listserver and Website. On the day of its release, the MBNMS immediately sent 75 copies of the Report to various local organizations, agencies and interested individuals. The MBNMS also gave various advance notices of the Report's release to the MBNMS Advisory Council, and immediately sent all of the Council members a copy of the Report on its release date (the MBNMS Advisory Council is an official link between the MBNMS Administration and various representatives of the community at

large). Finally, the MBNMS scheduled the issue on the agenda of no less than eleven public meetings, four of which were dedicated to no other issue than the Report itself.

**Comment:** The kelp Report needs to contain a brief explanation of the present State's method of regulating kelp harvesting.

**Response:** The MBNMS will make a copy of the State's management plan available to anyone who wishes to receive it. Those regulations are not the MBNMS's, and the MBNMS does not want to summarize California's regulatory regime and run the risk of mis-interpreting that regime to the public. Therefore, the MBNMS will request that the DFG include a summary of the State's regulatory regime in its CEQA document.

**Comment:** The amount of kelp harvested in leased beds should be publicly releasable due to the fact that the harvests are of a public natural resource. The MBNMS should work to get this information released to the public.

**Response:** Recognizing our own interests, and the desire of the public for a full disclosure of where and when their natural resources are being utilized, the MBNMS has worked with DFG to review State law on the matter. On March 8, DFG General Counsel opined that privacy of business information from California leased kelps is not protected under State law. Data from these beds, and other data not available at the time of the first release, have been released to the MBNMS and are incorporated in this release of the Draft MBNMS Kelp Management Report.

**Comment:** The MBNMS is focusing its attention and concern on the area of the Monterey Peninsula, and is not being concerned with the other parts of the MBNMS. Additionally, the MBNMS may apply a solution to the Cannery Row problem to all parts of the MBNMS, thereby creating new problems.

**Response:** The purpose of the MBNMS Kelp Report is to develop an MBNMS wide view on the uses of kelp in the entire MBNMS. By chance, a major use conflict occurs along the coastlines of Monterey and Pacific Grove, and the MBNMS has had to expend a large portion of its time dealing with that area. Obviously any solutions found to that problem should be applied only to that area, and should not be accepted for areas where the problem does not exist. However, the MBNMS is interested in finding out if it has overlooked any issues in other areas that need attention. For this reason, the MBNMS scheduled public meetings for the first release along most of the MBNMS coastline, including one in Cambria and one in Half Moon Bay. The MBNMS will schedule meetings for the second release of the Report in those same areas.

**Comment:** The MBNMS should be required to write an Environmental Impact Statement (EIS) for the management of kelp within its bounds.

**Response:** The MBNMS is not, at this time, considering an action (e.g., rulemaking) that would trigger the drafting of an EIS or other document under the National Environmental Policy Act (NEPA). The MBNMS would like to give the California State management agencies the opportunity to manage this resource under their management regime, which will include the drafting of a CEQA (California Environmental Quality Act) environmental document. The MBNMS will be actively commenting on both the State's CEQA document, as well as on any management regime that follows from it.

## **Management Recommendations**

**Comment:** By virtue of the plan, the MBNMS may be in violation of the Endangered Species Act with regard to sea otters.

**Response:** The MBNMS is in compliance with the Endangered Species Act. The MBNMS Kelp Management Report is background information and a collection of recommendations based on current scientific understanding of kelp as a harvestable resource, and as an important habitat component within the Sanctuary. The MBNMS, by issuing the report, is not authorizing DFG to "take" sea otters, nor could it: the authority to issue permits for the incidental take of sea otters resides with the Department of the Interior, U.S. Fish and Wildlife service. The commenter fails to show how the MBNMS is deferring to the State on development of a kelp harvesting plan. While kelp harvesting is identified in the MBNMS Designation Document as potentially subject to regulations, the MBNMS regulations currently do not restrict or prohibit kelp harvesting.

**Comment:** A moratorium on new kelp harvesting permits should be implemented, at least until solutions to the various problems are found and set up.

**Response:** The MBNMS agrees that a limited moratorium on kelp harvesting permits may be one part of a solution to the observed problems, at least until longer term solutions can be found.

**Comment:** There should be more restrictions on kelp harvesting, such as: no-take beds/zones; quotas per bed; quotas per unit time; harvest times; conditions and areas for kelp harvesting, such as stretches along the coastline, as well as seasons. Perhaps a system of rotating the beds to harvesters could be considered. Some of these restrictions should have considerations built into them based on importance of the beds to local economies for recreational industry purposes, such as tourism.

**Response:** The MBNMS agrees that all of these ideas may be part of a solution to the observed problems, and will continue to consider them. The MBNMS also agrees that local economic interests should be considered by the management agencies.

**Comment:** Sea otters should not be harassed from going south of Point Conception. Sea otters are an important part of the kelp forests and may help the survival of kelp plants in southern California.

**Response:** The issue of sea otter migrations beyond Point Conception is beyond the scope of this project.

**Comment:** The MBNMS should stop all kelp harvesting in all or part of the MBNMS. **Response:** The MBNMS does not agree with this comment. Kelp harvesting in the MBNMS is, and has been for many years prior to the establishment of the MBNMS, part of the important economic endeavors associated with mariculture of abalone, herring roe fishing, and synthesis of industrial compounds. Provided proper management of the kelp resource is implemented, kelp harvesting can be a sustainable and rewarding component to the local economy, with little environmental impact.

**Comment:** A five year planning and execution cycle for kelp harvesting management is too long for effective and proper management. There should be a shorter term cycle so that the kelp resource can be properly protected.

Response: The MBNMS belives that a benefit from a long-term (5 year) cycle for kelp management is that it allows the management agencies and public to properly evaluate the benefits and drawbacks of management strategies. Safeguards exist, at both the State and Federal level, for reaction to emergency situations where the kelp resource, or other MBNMS resource, may be at risk from unforeseen circumstances. At the Federal level, the MBNMS has the authority to issue "Emergency Regulations." Emergency Regulations, including prohibitions, can be issued for any activity..... "Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss or injury......" (MBNMS Designation Document). DFG has similar such authority at the State level.

**Comment:** Since the MBNMS and DFG have emergency regulatory authority, a set of criteria need to be set up to determine when a kelp bed should be closed due to emergency situations. **Response:** The MBNMS agrees that the monitoring program for the MBNMS and State's ocean resources is limited by fiscal resources. The MBNMS is attempting to set up an MBNMS-wide resource monitoring program, including a kelp bed resource component. Such a program will conduct over-flights of the MBNMS kelp beds to assess their health. Once this monitoring program is in place, and the natural variability has been assessed, criteria will be established to help determine when portions of the MBNMS kelp resource are not responding in natural fluctuations.

**Comment:** The State regulations allow harvesters to cut 50% of a bed's surface canopy per day. Theoretically, the same harvester could come back the next day and harvest another 50%. This is a potential inadequacy in the DFG regulatory regime that could be tightened to ensure potential kelp resource abuse does not occur.

**Response:** At the present time, there appears to be a lot of confusion in the public about the existing, so-called "50% Rule". The 50% rule is not in the state regulations or code, but appears in the language of most (if not all) kelp bed leases. However, the legal wording of the lease language may not be succinct enough to dissuade multiple interpretations. ISP Alginates presently interprets the language of their kelp bed leases to mean that no bed can be harvested for more than 50% of it's maximum canopy cover per year (Dale Glantz, pers. comm.). For Open Beds, where no lease language is utilized, several harvesters could, in theory, take more than 50% of a bed's canopy cover per year.

In order to reduce confusion on the issue, as well as to protect the Open Beds in the same manner as Leased Beds, the MBNMS is going to recommend that the FGC adopt regulatory language that forbids the annual harvest of a kelp bed's canopy in excess of its 50% maximum canopy cover. This rule will require closer ongoing harvest monitoring by DFG, especially in the case of Open Beds. However, the MBNMS believes the extra resource management effort would be worthwhile. When DFG determines that 50% of a kelp bed's maximum canopy cover has been reached, DFG should have the authority to close that kelp bed to harvesting for the rest of the calender year.

**Comment:** The State tonnage fee should be increased. \$1.87 per ton, and various leasing fees, is generally too low for a public resource like kelp. Since this report indicates that numerous scientific unknowns exists with regard to kelp management questions, perhaps some or all of this money could be applied for research purposes.

**Response:** The MBNMS believes this comment has merit. The MBNMS believes this issue should be researched and discussed further.

**Comment:** Immediate work is needed to protect rockfish populations from over-harvest.

**Response:** This comment is beyond the scope of this project.

**Comment:** The kelp Report does not consider the future kelp requirements if existing abalone farms expand.

**Response:** While the MBNMS did not mention growth of existing abalone farms per se, it was a consideration that started us down the path of writing the MBNMS Kelp Report. This oversight has been corrected in this, the second release of the Report.

**Comment:** Self-regulation by the harvesters, via a cooperative or other instrument, is not possible.

**Response:** The MBNMS does not entirely agree with this comment. While it may not be prudent to entirely allow an industry to self-regulate, there are times when an industry's self interests can coincide with an interest in diligent self-regulation. Perhaps an example of this is the SCUBA diving industry, which for years has avoided government regulations by setting up industry standards that are strictly adhered to.

**Comment:** The MBNMS needs to conduct more public education about the issue of kelp forest management and ecology.

**Response:** The MBNMS agrees that more public education is needed on this issue, and will be evaluating strategies to help. In part, preparing this Kelp Management Report has been designed to help improve the public's awareness and common understanding of kelp forest issues.

**Comment:** The MBNMS should set up an emergency public alert system to help notify people when pollution occurs in the MBNMS, such as sewage spills.

**Response:** While this comment is generally beyond the scope of this process, the MBNMS agrees that an emergency public alert system would be useful for sewage or oil spills in the MBNMS. MBNMS staff concerned with emergency response situations have been alerted to this desire by the community and are addressing this issue.

**Comment:** The MBNMS needs to help facilitate the access of the kelp harvesters to other areas of the MBNMS in order to spread out the effect of kelp harvesting in certain areas.

**Response:** The MBNMS does believe that one non-regulatory potential solution to the problems of kelp resource user conflicts is to potentially open up new areas of the MBNMS coastline to kelp harvesting and other kelp forest activities. However, new problems may arise from such an effort, and there may be all types of legal and jurisdictional issues involved. Therefore the MBNMS will continue to consider this as an option and examine the issues involved.

**Comment:** The MBNMS should not facilitate the access of the kelp harvesters to other areas of the MBNMS.

**Response:** See Response to Comment above.

**Comment:** The MBNMS staff should be concerned about significant environmental risks to the MBNMS, such as the water quality and the recent sewage spills, rather then be concerned with an insignificant issue such as kelp harvesting.

**Response:** The MBNMS continues to dedicate a significant amount of its limited resources to other vital issues besides kelp harvesting. The public, through various means including the MBNMS Advisory Council, has raised kelp harvesting as a significant issue they would like to see addressed in their Sanctuary. The MBNMS is obliging that request.

With regard to water quality and sewage spills, it should be noted that the MBNMS has a relatively large Water Quality Protection Program.

**Comment:** Monitoring and enforcement efforts for existing regulations are inadequate. A full explanation of the existing monitoring and enforcement efforts is needed.

**Response:** The MBNMS concurs that all monitoring and enforcement efforts, for all MBNMS resources, are not funded at an ideal level. The MBNMS is constantly working to rectify this problem, and dedicate as many resources to these fields as is possible. As part of the DFG CEQA document, the MBNMS will be asking for a full analysis of the State's management regime, with a description of its monitoring and enforcement efforts.

**Comment:** The Kelp Report needs to recognize that kelp harvests remain constant year to year, or vary only as businesses come and go, or increase/decrease their production. Such fluctuations may, in times of high kelp productivity, be sustainable, but may not be sustainable in times of low kelp productivity.

**Response:** The MBNMS agrees with this comment, and has tried to structure its draft recommendations accordingly.

**Comment:** It is not reasonable to expect the State to take on more diligent activities in kelp harvesting regulation without ensuring it has the funds to do so.

**Response:** The MBNMS concurs with this comment, and has specifically requested DFG, as part of its CEQA process for kelp management, evaluate its fiscal needs for proper kelp resource management. In this respect, the people of California will be able to affect public policy should the needs of DFG not be adequate for the job at hand.

**Comment:** The MBNMS should recommend that all or part of the MBNMS kelp beds be set aside as hand harvesting only.

**Response:** The MBNMS concurs with this comment.

**Comment:** Reconsider the four-foot cutting rule that allows harvesters to cut four feet below the surface regardless of the tide level.

**Response:** The MBNMS does not believe, at this time, that a reconsideration of the four-foot cutting rule, by making the cuts shallower, would have any significant impacts on the

environmental or user conflicts issues raised through this process. In fact, the MBNMS has observed that hand-harvesters generally cut only at the surface anyway.

**Comment:** The Federal government should take over management of California's kelp harvesting under the Magnuson-Stevens Fisheries Conservation and Management Act. **Response:** The MBNMS does not believe the Federal government has the authority to initiate management of California's kelp resources under the Magnuson-Stevens Fisheries Conservation and Management Act. The kelp resources offshore California are almost entirely (perhaps entirely) within the State's 3-mile jurisdiction. In fact, the mbnms does not believe any of the other criteria for management under the Magnuson-Stevens Fisheries Conservation and Management Act are met either.

**Comment:** There should be an open fishery on sea hares, which can have a devastating affect on kelp forests.

**Response:** Sea hares are a natural component of central California kelp forests. As such, a discussion of a proposed fishery on them is beyond the scope of this project.

# Appendix 3

The effects of small-scale kelp harvesting on giant-kelp surface canopy dynamics in the Ed Ricketts Underwater Park -

Summary of the Final Report to the Monterey Bay National Marine Sanctuary and the Cities of Monterey and Pacific Grove

March 17, 1999

By: Michael D. Donnellan and Michael S. Foster Coastal Solutions Group

#### **SUMMARY**

The effects of hand-harvesting giant *kelp (Macrocystis pyrifera)* on the surface canopy of kelp forests offshore of Monterey and Pacific Grove were investigated. This study was stimulated by concerns over the possible negative biological effects of recent intensive kelp harvesting by local aquaculture firms on giant kelp, rockfish, and sea otter populations, particularly when harvesting activities are concentrated within a small local area during the winter. We used aerial photographs dating to 1976 and kelp harvest records to address only the question of important harvest effects on giant kelp canopies, not the general effects of kelp harvesting. Three different periods of kelp harvesting relative intensity in this area have occurred since the early 1970s: a period of "moderate harvest" from 1972 - 1985, a period of "low harvest" from 1986 - 1995, and a period of "high harvest" from 1996 to present. Eight surveys were available from each of the periods of 1972 - 1985 and 1986 - 1995, and two surveys were available from the period of 1996 - 1998.

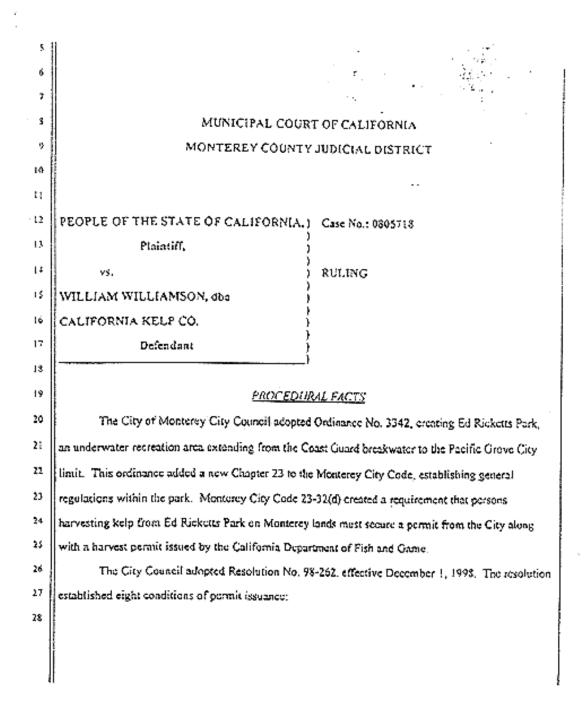
For the years in which aerial kelp surveys were available, hardcopy maps of kelp forest canopies were derived from aerial survey slides taken during the fall period of maximum canopy extent. The resultant maps were scanned into a computer, and image analysis software was used to measure kelp canopy surface area (the actual surface area of kelp canopy fronds floating on the surface), kelp forest spatial extent (the total surface area of a kelp forest canopy contained within its outer perimeter), and kelp canopy density (an index of canopy abundance within a given kelp forest ranging from "dense" to "sparse"). Using a modified Before - After - Control - Impact (BACI) study design and analysis of variance (ANOVA) statistical testing, these variables were compared between three harvested areas and one unharvested control area (Hopkins Marine Life Refuge) during each of the three periods of relative harvesting intensity. Since the period of interest (from 1996-1998) had a sample size of only two, we could not make rigorous, meaningful comparisons between this period and the other two periods. However, we were able to use a BACI approach (with two-sample t-tests) to test for a harvesting effect between the period of "moderate harvest" and the period of "low harvest." These comparisons were not directly applicable to the "high harvest" period of interest, but the results may suggest patterns to expect if the current level of kelp harvesting intensity continues. Regression analyses

of the amount of kelp harvested during the winter versus the maximum amount of giant kelp surface canopy present during the following year were also performed.

No statistically significant differences in kelp canopies among periods were found using ANOVA analyses, and results of regression analyses were also statistically non-significant. No effects of current kelp harvesting practices on giant kelp canopies were detectable, but statistical power to detect an effect was low given the small sample size (n = 2) of the "high harvest" period and the inherent natural variability of kelp canopies. Therefore, these results do not necessarily indicate that there was not a harvesting effect, only that such an effect was undetectable given the available data. Separate comparisons of kelp canopies between "moderate harvest" and "low harvest periods (NOT the period in question) showed significant differences between the two periods at one of the three harvested study sites, but these results may have been confounded by kelp harvesting immediately prior to the aerial surveys. If these results were not confounded, they suggest that harvesting concentrated within a relatively small area may negatively affect giant kelp canopies. Continued yearly aerial surveys during the period of fall maximum kelp canopy are needed in order to resolve this issue.

# Appendix 4

Judicial Ruling, Case No. 0805718, Municipal Court of California, Monterey County Judicial District.



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- Possession of a Department of Fish and Game kelp harvesting permit;
- Securing of a City of Monterey Business License;
- The kelp must be provided, sold, or utilized in mariculture or commercial fishing related businesses primarily located within Montercy;
- 4. Harvesting must be done by hand;
- No harvesting can occur within any established no-take zones;
- The permit must be reviewed annually;
- Violation of conditions automatically voids the permit for a minimum of six months; and
- The permit is not transferable and revocable upon thirty days notice.

On December 27, 1998, the defendant was cited for a violation of Monterey City Code 23-32(d). On January 27, 1999, the defendant was advised of the charges, a plea of not guilty was entered, and \$220.00 bail was posted by the defendant. A court trial was set for May 5, 1999.

On May 5, 1999, it was stipulated that on December 27, 1998, the defendant did not have a permit to harvest kelp from the City of Monterey; that the defendant, through his company, harvested kelp within the boundaries of Ed Ricketts Park lands, and; that on December 27, 1998, a citation was issued for a violation of Monterey City Code 23-32(d).

The Court heard arguments and took the case under submission.

On June 17, 1999, the Court requested further briefing by both parties as any to impact arising from the creation of a National Marine Sauctuary and a copy of any deed documents regarding the area in question.

The Court, on July 26, 1999, took judicial notice of the management plan for the Monterey Bay National Marine Sanctuary.

## <u>RULING</u>

To understand the Court's ruling, a brief review of California land history is beneficial.

When the Mexican Government controlled the land known today as California, land was held in three different ways: pueblo land, patent land and trust land. The first type of land, pueblo land, was land held in trust by the alcalde (the local government leader) for the benefit of the Mexican

Government. Puchlo land was to be used for public and municipal purposes, subject to the control and disposition of the Mexican Government. City of Monterey v. Quand Jocks (1903) 139 Cal. 542, 543. Pueblo lands could include didelands. Tidelands are lands lying between the lines of mean high and low tide. City of Lung Bench v. Mansell (1970) 3 Cal.3d 462, 478. Pueblo land generally extended to four square leagues of land. Monterey was entitled to a larger allocation by special concession from the Spanish Crown. City of Monterey v. David Jocks, supra, at p. 544.

The second type of land was held by patent. Patent land was land granted by the Mexican Government to individuals living or working on a particular parcel of land. This land was controlled exclusively by the patent holder. The land could include tidelands. <u>United States</u> v. <u>Coronado Beach</u>

Co. 55 U.S. 472; <u>San Francisco</u> v. <u>Le Roy</u> (1891) 138 U.S. 656.

The third type of land is that which is held exclusively by the Mexican Government in trust. Tidelands not within the pueblo or held by patent fell within this category.

The Act of Congress of 1851 transferred land from the Mexican Government to the United States and from the United States to California. Land held by patent was confirmed as fee simple ownership. Pueblo lands were granted to municipalities in trust for public municipal purposes. Circ of Mantergy v. Cavid Jacks, supro, at p. 551. The remaining land was transferred to the U.S. Government, to be held in public trust. Most tidelands fell within this category.

Upon the acquisition of territory from Mexico, the United States acquired the title to the tidelands equally with the title to upland, but with respect to the former, they held it only in trust for the future States that might be creeted out of such territory. <u>Knucht</u> v. <u>United Land Association</u> (1891) 142 U.S. 161, 183.

California acquired title from the United States Government to navigable waterways and tidelands by virtue of its sovereignty when admitted to the Union in 1850. <u>Borox, Ltd.</u> v. <u>Los Angeles</u> (1935) 296 U.S. 10. This exercise of sovereignty was as a trustee for the public rather than in a proprietary capacity. <u>City of Long Beach</u> v. <u>Mansell</u>, supro. 3 Cal.3d 462; <u>People</u> v. <u>California Fish</u> <u>Co.</u> (1913) 166 Cal. 576.

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This transfer created the Tidelands Public Trust Doctrine, which is a creature of United States and California law and is an incident of sovereign title in tideland property. City of Los Angeles v Venice Peninsula Properties (1988) 205 Cal App 3d 1522.

The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and water remaining. <u>Hinnis Centrol</u>

Restroad Co. v. <u>Hinnis</u> (1892) 146 U.S. 387.

To understand the line of cases in this area and the distinctions from each other, it must be recognized that the Tidelands Public Trust Doctrine does not apply to lands that had been previously granted to other parties by the Mexican Government. <u>Son Francisco</u> v. <u>Le Roy</u> (1891) 138 U.S. 656, 670-671.

California did not acquire title to lands which were the subject of a prior Mexican land grant and later patented by the United States Government in accordance with its obligations under the Treaty of Guadalupe Hidalgo

The patent of the government is evidence of title and is conclusive against the government and all persons claiming under it. The patent is a deed of the United States and operates as a quit claim of any interest the United States may have reserved in the land. It establishes in the grantee full and complete title to the property. <u>Beard</u> v. <u>Federy</u> (1866) 70 U.S. (3 Wall.) 478.

Monterey has the unique distinction of possessing all three types of land previously discussed. As a former pueblo, it possesses land in trust. It has acquired property independent of the pueblo lands and possesses this land in fee simple trust as any individual might possess land. City of Monterey v. David Jacks, supra, at p. 551. Lastly, Monterey possesses land granted to it by the State of California, i.e., tidelands.

As evidenced in Attachments A, B, and C, this last acquisition of land (tidelands) is the subject of the city ordinance the defendant has been charged with violating. The City of Monterey, believing that kelp harvested on its land is subject to regulation, has passed an ordinance regulating this taking and selling. This belief is mistaken. The State of California could only convey tractands

pursuant to the restrictions of the Public Trust Doctrine. The conveyance evidenced in Attachments A. B. and C did not relieve the State of its obligations under the Public Trust Doctrine.

Tidelands subject to the public trust may not be alienated into absolute private ownership, attempted alienation of such tidelands passes only bare legal title, with the lands remaining subject to the public easement. <u>Circ of Long Beach</u> v. <u>Monrell</u> (1970) 3 Cal.3d 462.

It should be noted that the State may find it necessary to out off certain lands from water access and free them from the trust. <u>City of Long Beach</u> v. <u>Maniell</u> (1970) 3 Cal.3d 462. This land has traditionally been swampland not navigable by boat. Further, this was not the type of land conveyed by the State to the City of Monterey.

The power of the State to control, regulate and utilize its navigable waterways and lands lying beneath them; when acting within the terms of the trust, is absolute. *People v. California Fish Ca.*, support, 166 Cal. 597. Except as limited by the paramount supervising power of the federal government over navigable waters. *Calherg. Inc.* v. *State* 67 Cal.2d 416, 422.

One of the express interests of the public trust in tidelands is the control of commerce. <u>Ciry of</u>

<u>Long Beach</u> v. <u>Mansell</u> (1970) 3 Cal.3d 462.

Black's Law Dictionary, Fifth Edition, defines commerce as "The exchange of goods, products, or property of any kind; the buying, selling and exchanging of articles. The transportation of persons and property by land, water, and air. Intercourse by way of trade and traffic between different peoples or states and the citizens or inhabitants thereof, including (not only) the purchase, sale, and exchange of commodities..."

The City of Monterey's Ordinance 23-32(d) is regulating the harvesting and selling of kelp within the trusts area. The selling of kelp falls within the definition of commerce and therefore falls within the State's trust responsibilities.

The State has, pursuant to its trust obligations, regulated the harvesting and selling of kelp by enacting Fish and Game Code Chapter 6, Articles 1.4. The Fish and Game Code regulates harvesting kelp "in the waters of the State" and does not apply to privately owned property. (Emphasis added.)

If the City of Monterey had acquired the land from the Mexican Government as a patent as they assert, the Court may have come to a different conclusion regarding this issue. The land referred

to in the City of Monterey's ordinance was acquired by the California Legislature and as such is subject to the public trust limitations. The Court concludes that the charging of the defendant in violation of City of Monterey Ordinance 23-32(d) is beyond the City's granted powers, as the regulation of commerce (kelp) falls within the obligation of the State of California under the definitions of the Public Trust Doctrine. The Court thus finds the defendant not guilty of a violation of section 23-32(d) of the ó Monterey City Code DATED: August <u># 9</u>, 1999 Ю HARD ROYLEDGE, Commissioner Monterey County Municipal Court Attachments: A, B, & C 

# Appendix 5

Judicial Ruling, Case No. M43969, Superior Court of the State of California, County of Monterey.

Michael W. Stamp, State Bar #72785 Jeanine G. Strong, State Bar #145629 LAW OFFICES OF MICHAEL W. STAMP 1 2 500 Camino El Estero, Suite 200 Monterey, California 93940 3 SHERRIE, PEDERSEN Telephone: (831) 373-1214 Facsimile: (831) 373-0242 CLERK OF THE SUPERIOR COURT 4 DEPUTY Attorneys for Plaintiff 5 William M. Williamson d/b/a California Kelp Co. 6 7 Bill Lockyer, Attorney General Mary Hackenbracht, Senior Assistant Attorney General John Davidson, Supervising Deputy Attorney General 8. State Bar #50364 STATE OF CALIFORNIA 9 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004 Telephone: (415) 703-5525 10 (415) 703-5480 Facsimile: 11 12 Attorneys for Real Party in Interest California Fish and Game Commission 13 SUPERIOR COURT OF THE STATE OF CALIFORNIA 14 COUNTY OF MONTEREY 15 WILLIAM M. WILLIAMSON, doing business as CALIFORNIA KELP CO. CASE NO. M 43969 16 Date Action Filed: April 28, 1999 17 on his own behalf and on behalf of all others similarly situated. 18 Plaintiff, 19 ORDER AFTER FIRST PHASE OF BIFURCATED TRIAL 20 CITY OF MONTEREY: STEVE 21 SCHEIBLAUER, as HARBORMASTER OF THE CITY OF MONTEREY: and 22 DOES 1 through 100, inclusive, 23 Defendants. 24 CALIFORNIA FISH AND GAME 25 COMMISSION. 26 Real Party In Interest. 27 28 WILLIAM WILLIAMSON V. CITY OF MONTEREY ORDER AFTER FIRST PHASE OF CASE NO. M 43069 BIFURGATED TRIAL

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This case came on for the first phase of a bifurcated trial as scheduled on February 10, 2000. Michael Stamp appeared on behalf of Plaintiff William Williamson; John Davidson, Deputy Attorney General, appeared on behalf of Real Party-In-Interest California Fish and Game Commission; Michael Masuda appeared on behalf of Defendants City of Monterey and Steve Scheiblauer. The parties having stipulated to the bifurcation of this case, it was further stipulated that the Court should consider first the question of whether the City's regulations were Invalid on their face, and address the City's remaining affirmative defenses only if the Court determined that the regulations were fability valid.

The Court, having read and considered the briefs of all parties, having heard and considered the cral arguments of counsel, and having reviewed and considered the evidence admitted at trial, hereby ORDERS as follows:

- The regulation of kelp harvesting is not within the authority of the City of Monterey as a municipal affair of the City, and the City's regulation is invalid accordingly;
- Kelp hervesting is a field and a subject which are preempted by State law, as evidenced by the history, extent, and application of State regulations, and the City's regulation is invalid accordingly;
- The City of Monterey's regulation of kelp harvesting conflicts with the State's regulation, and the City's regulation is invalid accordingly;
- 4. Plaintiff's remaining claims as to the invalidity of Monterey's regulations of kelp harvesting (including Plaintiff's Commerce Clause claim) relating to the geographic restrictions are not addressed at this time due to the Court's finding that Monterey had no authority to regulate kelp harvesting.
- The damages phase of the bifurcated trial is set for jury trial on July 10, 2000,
   and the Clerk will provide notice of trial and of the settlement conference.

Dated: 2 /24/2000

MICHAEL S. FIELDS

Honorable Michael Fields Judge Presiding

WILLIAM WILLIAMSON +. CITY OF MONTEREY CASE NO. M 43989

ORDER AFTER FIRST PHASE OF BIFURCATED TRIAL

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# Appendix 6

#### MONTEREY KELP COOPERATIVE

#### **CHARTER**

#### INTRODUCTION

The Monterey Kelp Cooperative (hereafter refered to as "the Cooperative") is hereby formed as a means to establish a mechanism by which kelp hand-harvesting along the Area (hereafter referred to as "the Area") from the Monterey Coast Guard Breakwater to Lover's Point in Pacific Grove can be self-regulated to ensure ongoing sustainable harvests of kelp, and to avoid conflicts with other users of these kelp beds. The Cooperative will enable Cooperative members to work in a safer environment in the winter months when hand harvesting in small boats is frequently dangerous outside the Area. The Cooperative will also pursue activities such as scientific and resource management research when the goals of such activities further the intent of the Cooperative.

The Cooperative will provide a means for its members to communicate with each other, on a regular schedule, their needs for kelp and intentions for meeting those needs. Such communication should facilitate the efficient utilization and protection of the kelp resource, and hopefully, cooperation on projects of a mutual benefit to the members of the Monterey Kelp Cooperative.

It is the desire of the Cooperative that the Area be preserved as an area where kelp is only harvested by hand.

#### **MEMBERSHIP**

As of the implementation of this Charter, the membership of the Monterey Kelp Cooperative will consist of the following companies and individuals:

- -Pacific Abalone Farms, represented by Gary Russell
- -Monterey Abalone Company, represented by Joe Cavanaugh
- -Grillo Enterprises, represented by Phyllis Grillo-Weinbrenner
- -US Abalone, represented by David Ebert
- -Pacific Mariculture Inc., represented by Pete Scrivani
- -California Kelp Company, represented by Bill Williamson

#### **BOARD OF GOVERNORS**

The Monterey Kelp Cooperative shall be managed by a Board of Governors comprised of the following three Governors:

- 1. Member Governor This Governor shall be elected annually by a majority vote and appointed by the members of the Cooperative. The Member Governor position shall annually pass between a Cooperative member whose business enterprise is predominately north of Moss Landing, and a member whose business enterprise is predominately south of Moss Landing.
- 2. Manager Governor This Governor shall be the Regional Manager for the Marine Region of the California Department of Fish and Game or his/her designee. This person must be a Department of Fish and Game employee and resource management professional with no fiscal interest in kelp harvesting or related activities.
- 3. Scientist Governor This Governor shall be nominated by the other two Governors and approved by the Superintendent of the Monterey Bay National Marine Sanctuary. This person must be a marine scientist with a proven understanding and research background (by publication in scientific journals) of giant kelp biology. This person can have no fiscal interest in kelp harvesting or related activities.

All Governors shall serve at the pleasure of their appointing authority, and shall be replaced with another person at the total discretion of that appointing authority.

The following powers shall be entirely within the domain of the Board of Governors, and shall be limited solely to it:

- 1. To amend this charter as they see fit with a majority vote of the Board of Governors.
- 2. To call and schedule meetings of the Board of Governors.
- 3. To establish a Cooperative Kelp Plan for the Area, and review the plan annually.
- 4. To establish contingency plans for kelp in the event that the annual Kelp Plan becomes infeasible.
- 5. To consider and approve as appropriate new members into the Monterey Kelp Cooperative.
- 6. To establish guidelines for collecting kelp within the Area.
- 7. To investigate the feasibility of kelp enhancement programs, as well as other research of potential benefit to, and within the scope and resources of, the Cooperative.

All members of the Cooperative are encouraged arid expected to attend the Board of Governors meetings. Informing members of the Cooperative about upcoming meeting dates shall be the sole responsibility of the Member Governor. Board meetings can be called by agreement of any two Governors, and a quorum shall be deemed to be met with only two Governors present, provided the other Governor is informed of the meeting at least 24 hours in advance.

Any Governor can appoint an alternate to represent their seat on the Board, provided that appointment is submitted in writing to the other two Governors, is signed by the appointing Governor, and designates the exact length of time that alternate's authority exists.

All Board of Governors votes shall be done by voice, and all resolutions shall be considered to be passed if two of the three Governors vote in favor of the resolution.

### MEMBERSHIP RIGHTS AND RESPONSIBILITIES

Members of the Cooperative are expected to:

- 1. Actively participate in it, through Cooperative discussion and collaboration.
- 2. Submit an annual kelp collecting plan and a report of the previous year's harvest to the Cooperative and work constructively to arrive at a unified plan to submit to the Board of Governors.
- 3. Abide by guidelines enacted by the Board of Governors.
- 4. Attend an annual meeting of the Cooperative, or send a proxy.

#### **KELP PLAN**

On or before October 1 of each year, the members of the Monterey Kelp Cooperative shall present a draft consolodated Kelp Plan which includes a proposed number of tons per week to be collected from the Area, and a consolodated harvest report from the previous year. The Board of Governors shall have until October 31 to approve or amend the plan submitted to them.

#### **IN-SEASON ADJUSTMENTS**

The Board of Governors shall have at their discretion to amend or replace the Kelp Plan in place at that time.

The Coopeartive Governor shall consult with the other Cooperative Members prior to the affecting the change.

# EFFECTIVE DATE

This Charter shall take effect upon signature by all initial Cooperative Members.

Original Signed by: Gary Russell, Pacific Abalone Farms Joe Cavanaugh, Monterey Abalone Company Phyllis Grillo-Weinbrenner, Grillo Enterprises David Ebert, US Abalone Peter Scrivani, Pacific Mariculture, Inc. Bill Williamson, California Kelp Company

## Appendix 7

Consensus Recommendation Document supplied to the MBNMS by a subcommittee of the MBNMS Business and Tourism Activity Panel (BTAP)

Minutes of the Meeting of the BTAP Subcommittee on Kelp Harvesting in the Ed Ricketts Underwater Park.

July 27, 1999

(Last revised 7-29, 1999)

Present were: Dave Ebert, Al Huelga, Michelle Knight, Art Seavey, Steve Webster (facilitator)

The meeting began at 10:20 am. All agreed on ground rules and on the desired "product" from the meeting.

The following points were agreed-to and will be reported to the BTAP:

Other activities in Cannery Row

Kelp bed – Breakwater to Lover's Point (Ed Ricketts Underwater Park) not represented at this meeting:

Collecting kelp for

- 1. Herring roe industry
- 2. Granite Canyon state toxicology lab
- 3. Scientific research
- 4. Educational collecting (not MBA)

## We agree:

- 1. This is a temporal and spatial resource use problem in the Ed Ricketts Underwater Park.
- 2. The problem time is January through February most years.
- 3. Canopy is needed (valued) for:
  - a. Aquaculture
  - b. Otter and other animal habitat
  - c. Divers
  - d. Kayakers
  - e. Science
    - 1. Agency
    - 2. University
- 4. Continue voluntary Cannery Row control study site for a total of 3 years (year one is in progress).
- 5. Develop Stillwater Cove alternative winter site for as many users as possible. Use it

in preference to Cannery Row when possible during January and February if kelp canopy is severely limited along Cannery Row.

- 6. Kelp co-op to share collection (being done since last winter) data with Monterey Bay National Marine Sanctuary. Include and differentiate between cut and drift kelp in reports.
- 7. This committee recommends:
  - a. This local management planning and input to be adopted by state/federal management plans.
  - b. No splinter groups Local buy-in by all users.
  - c. Effective management for healthy, sustainable kelp forest resources.
  - d. Healthy canopy all year.
  - e. Thorough study of effect of control area vs. harvested area on Cannery Row.
  - f. Design a responsive and rapid appeal process to Monterey Bay National Marine Sanctuary and/or Cal DFG.
  - g. Review management plan every 5 years, or as needed.
  - h. No harvest at all along Monterey breakwater.
  - i. Have ongoing community-based management advisory group to advise Monterey Bay National Marine Sanctuary staff in issues of concern, emergency permits, appeals, plan updates. (We're volunteering and would add a kelp forest scientists and/or scientist from the RAP).
  - j. Explore funding for kelp enhancement (artificial reef project) off Del Monte Beach (30-60 feet deep)